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**BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON**

**DWIGHT IRBY,**

**Appellant,**

**v.**

**STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY;  
COWLITZ COUNTY; and LONNIE  
WADDLE and PATTI WADDLE,  
husband and wife;**

**Respondents.**

**SHB No. 93-13**

**FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER**

The Shorelines Hearings Board ("Board") heard this case, on November 18, 1993, in the Commissioner's Hearing Room, in the Cowlitz County Administration Building, in Kelso, Washington.

Appellant, Dwight Irby ("Irby") was represented by J. Lawrence Coniff, attorney. Respondent, Cowlitz County ("County") was represented by David R. Ross, Deputy Prosecuting Attorney. Respondents, Lonnie and Patti Waddle ("Waddles") were represented by Allen T. Miller, Jr., of Connolly, Holm, Tacon & Meserve, attorneys. Respondent, Department of Ecology ("Ecology") did not participate in the hearing.

The Board was comprised of: Robert V. Jensen, presiding; Richard C. Kelley, James A. Tupper, Jr., Bobbi Krebs-McMullen, Dave Wolfenbarger, and Richard Gidley. Mr. Tupper did not participate in the original hearing, because that position was then vacant, due to the resignation of Harold Zimmerman. Mr. Tupper, when he came on the Board, reviewed the entire record and listened to the tapes of the proceedings.

Louise M. Becker of Gene Barker & Associates, Inc. of Olympia, recorded the proceedings.

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2 IV

3 The County, in 1991, approved a shoreline substantial development permit and a  
4 shoreline conditional use permit for Irby to locate a private marina, four floating homes, two  
5 boat houses, an upland septic system, and upland parking on Fisher's Slough. The County did  
6 not require Irby to obtain a variance for location of the floating homes.

7 V

8 The County, in 1977, adopted the Cowlitz County Shoreline Master Program  
9 ("CCSMP"). Ecology approved it as a state regulation in 1978. The CCSMP designates  
10 Fisher's Slough as a conservancy environment.

11 VI

12 The Waddles, on August 4, 1992, applied to the County for a shoreline substantial  
13 development permit, a shoreline conditional use permit, and a shoreline variance permit, to  
14 build: a floating house (26 feet by 42 feet) on a floating dock (8 feet by 50 feet), a 25 feet by  
15 6 feet walkway and steps to the dock; and to place 300 cubic yards of fill for parking 4 cars,  
16 on the small parcel of land waterward of the dike. The application was to allow fill for  
17 parking along the entire 163 feet of the property.

18 VII

19 The environmental checklist, which was filed one day later described this two story,  
20 two bedroom floating home as a "personal single family home". The checklist explained that  
21 the proposal for domestic sewage, was to pump the waste to an upland septic system. The  
22 system was designed for a three bedroom house, because two adults and one child would be  
23 living in the structure.

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## VIII

On September 10, the County issued a determination of non-significance ("DNS") for the Waddles' proposal. This document described the proposal as follows:

*Shoreline Substantial Development/Conditional Use/Variance and Floodplain permit applications to construct a 26' x 42' float house, a 6' x 74' float deck around 2 sides of the house, a 4' x 38' walkway and stairs from float to shore, a 3-car parking area along Willow Grove Road using 360 cubic yards of clean fill, reconstruct an existing dock and walkway into a 6' x 92' dock, and install an engineered septic system on an upland site north of Willow Grove Road, all within the shoreline area of the Columbia River/Fisher Island Slough. The dock and floating home will extend 78 feet waterward from the ordinary high water mark.*

## IX

The County amended the DNS on December 17, 1992. The addendum moved the proposed floating home closer to shore by 14 feet. The shoreline variance, which the County approved on January 11, 1993, limited the waterward extension of the floating home to 57 feet from the ordinary high water mark. The site plan, approved by the County at that time, shows the floating home to be 54 to 55 feet waterward of the ordinary high water mark. We find that the proposal, as approved by the County, places the proposed floating home, 54-55 feet waterward of the ordinary high water mark. The fill for parking was limited to 88 lineal feet along the road.

## X

Ecology approved the shoreline conditional use and variance permits on February 9, 1993.

## XI

The Department of Fisheries ("DOF"), on November 2, 1992, approved an hydraulics permit for the Waddles' proposed floating home and docks. That permit contains a condition

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2 that the docks must be at least 25 feet waterward of the ordinary high water mark, to allow for  
3 juvenile salmonid migration.

## 4 XII

5 The variance for the floating home was from the CCSMP provisions that limit floating  
6 homes to location in moorage slips which extend no more than 50 feet from the ordinary high  
7 water mark. The Waddles failed to cite any restrictions that would prevent them from building  
8 a floating home that would fit within the 50 foot waterward and 25 foot shoreward limits  
9 established by the CCSMP and DOF requirements.

## 10 XIII

11 Public access to the water is available at Willow Grove Park, which is situated about  
12 one and one-half miles west of the proposal, on Fisher's Slough. The County did not require  
13 public access as a condition of the Waddle's permit.

## 14 XIV

15 The parking variance is from the CCSMP provision which prohibits parking within 20  
16 feet of the ordinary high water mark.

## 17 XV

18 Irby appealed the permit decisions to this Board on March 10, 1993. The appeal was  
19 certified by Ecology and the Attorney General on April 6, 1993.

## 20 XVI

21 A pre-hearing conference was held, which defined the issues in the case. These were  
22 subsequently amended and several were deleted as the result of a summary judgment motion.  
23 The remaining issues are whether: 1) the proposed floating home a water dependent use; 2) the  
24 proposal satisfies variance criteria of the CCSMP and WAC 173-14-050; and 3) the applicant  
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2 Pertaining to Parking Variance Issue and Agreed to By Members: Jensen, Kelley and  
3 Krebs-McMullen

4 XX

5 Mrs. Waddle was asked why she and her husband did not reserve an easement for  
6 parking on the parcel they sold to the Looks. She was unable to provide an explanation. She  
7 further explained that she has not explored the possibility of obtaining an easement from the  
8 Looks for this purpose.

9 XXI

10 The County did not consider requiring the Waddles to provide their parking across the  
11 road, as they had Mr. Irby.

12 XXII

13 County standards require a minimum of two parking spaces per residence.

14 XXIII

15 The only reason testified to at the hearing, for preferring parking on the water side of  
16 the road, was traffic safety. We do not find this evidence persuasive, because the requirement  
17 that Mr. Irby place his parking on the opposite side of the road, belies a realistic concern with  
18 traffic safety. There was no specific evidence presented which supported this conclusory  
19 testimony, which we regard as an afterthought, to justify a convenient result for the Waddles.  
20 Parking is not a water, nor shoreline dependent use, which requires proximity to the water or  
21 to the shoreline.

22 Pertaining to All Issues

23 XXIV

24 Any conclusion of law deemed to be a finding of fact is hereby adopted as such. From  
25 these findings of fact, the Board makes the following:

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2 governmental entities to avoid applying land use restrictions which would deny a property all  
3 beneficial use of the property. Id. at sec. 20.02.

#### 4 IV

5 Cowlitz has adopted an especially restrictive approach to variances, which it is allowed  
6 to do under Ecology regulations. WAC 173-14-155 provides that: "[l]ocal government and the  
7 department may, in addition, apply the more restrictive criteria where it exists in approved and  
8 adopted master programs".

#### 9 V

10 The CCSMP contains the following criterion for obtaining a variance, which is more  
11 restrictive than that found in WAC 173-14-150:

12 *The property owner must show that if he complies with the*  
13 *provisions he cannot make any reasonable use of his property.*  
14 *The fact that he might make a greater profit by using his property*  
*in a manner contrary to the intent of the program is not a*  
*sufficient reason for variance.*

15 CCSMP, VARIANCES, at 29.

#### 16 VI

17 The Board affirmed application of an identical standard in the Pierce County Master  
18 Program, in Simchuk and Pierce County v. Department of Ecology and Stoltenberg, SHB No.  
19 84-64 (1985). There the Board declared that:

20 *The approved and adopted master program (PCSMP) does*  
21 *contain a more restrictive criteria than the minimum criteria of*  
22 *the DOE. This is because the PCSMP criteria, unlike the DOE*  
23 *criteria, requires the applicants to carry a heavy threshold burden*  
24 *of proving that without a variance, he cannot make any*  
*reasonable use of his property. Accord, Green v. Bremerton,*  
*SHB No. 81-37 (1982) and Pier 67, Inc. v. Seattle and DOE,*  
*SHB No. 81-31 (1981).*

1  
2 RESIDENTIAL DEVELOPMENT, REGULATIONS, CONSERVANCY DISTRICT, at 57.

3 XI

4 The use regulations for residential docks and floating structures require that:

5 Boat docks shall not extend any further than 50 feet from the lines of ordinary high  
6 water mark . . .

7 CCSMP, RESIDENTIAL DOCKS AND FLOATING STRUCTURES (PIERS),  
8 REGULATIONS, CONSERVANCY, RURAL AND URBAN DISTRICTS, "Boat Dock  
9 Regulation 2," at 37.

10 XII

11 Again we refer back to the basic premise in the CCSMP, that over-the-water residential  
12 uses should not be allowed. In addition, the County has designated Fisher's Slough as a  
13 conservancy environment. The CCSMP applies that designation to:

14 *(t)hose shoreline areas endowed with resources which may be*  
15 *harvested and naturally replenished. Also, those areas, which*  
16 *through flooding, slide prone soils, or other natural parameters*  
17 *are not suitable for intensive agriculture or high density human*  
18 *use.*

19 SHORELINE MANAGEMENT DISTRICTS, CONSERVANCY DISTRICT, at 25.

20 XIII

21 Finally, Fisher's Slough is a shoreline of state wide significance, under the SMA.  
22 Such shoreline are reserved for uses which:

- 23 (1) Recognize and protect the state-wide interest over local interest;  
24 (2) Preserve the natural character of the shoreline;  
25 (3) Result in long term over short term benefit;  
26 (4) Protect the resources and ecology of the shoreline;  
27 (5) Increase public access to publicly owned areas of the shorelines; and  
(6) Increase recreational opportunities for the public in the shoreline.

RCW 90.58.020; CCSMP, OVERALL GOALS, at 2.

1  
2 require public access as a condition of a single-family residential development, in isolation.  
3 However, we believe, that in order to bring the CCSMP in consonance with the policies of the  
4 SMA, the County and Ecology should consider amending the master program, to require that  
5 residential development conform to a logical program of providing public access. If the  
6 County plans to continue to allow floating homes on Fisher's Slough, it should have in place a  
7 plan which provides defined points of public access throughout the slough.

8 Pertaining to Parking Variance Issue and Agreed to by Members: Tupper,  
9 Wolfenbarger and Gidley

#### 10 XVII

11 The variance for parking meets the criteria for granting variance permits under  
12 WAC 173-14-150(2) and is consistent with the policies of the SMA and the CCSMP.

#### 13 XVIII

14 Strict application of the twenty foot setback requirement that would otherwise apply to  
15 the proposed parking under the CCSMP would result in denying the applicants safe access and  
16 thus significantly interfere with reasonable use of the property. The hardship created by the  
17 lack of available parking is related to the unique conditions of the property and does not result  
18 from any actions by the applicants. The fact that the applicants previously owned and  
19 conveyed upland property adjacent to Willow Grove Road and across from the subject property  
20 does support a finding that the applicants caused the hardship. The applicants would be denied  
21 reasonable use of the subject parcel without the variance for parking even if they retained part  
22 or all of the upland property. Traffic conditions on Willow Grove Road simply render access  
23 to the subject property unsafe without river side parking. Without reasonable access, the  
24 applicants are denied reasonable use of the property within the meaning of WAC 173-14-  
25 150(2)(a).  
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XIX

The facts in this case are readily distinguishable from Wisall v. Clark County, SHB No. 90-37 (1991). That case involved a proposal to build a home within a set back limit where there was no structure within the set back limits for a considerable distance on either side of the property. In that case, the Board also found that construction within the set back limits would have had an adverse impact on wildlife. In contrast, the applicants here seek only a parking space that would be consistent with every other lot on Willow Grove Road along Fisher's Slough. More important, the applicants here would still be entitled to river side parking even if they retained upland property. They are thus unlike the applicant in Wisall who could have constructed his home outside the set back limits if he had not conveyed away an adjoining upland parcel.

XX

We further conclude that the variance is compatible with other permitted activities in the area, that it is the minimum necessary to afford relief, that it does not constitute a grant of special privilege, that the public interest will not be adversely impacted and that a variance will have no adverse cumulative impact on the shoreline environment of the area. These conclusions are based on three critical findings: (1) that every other lot on Fisher's Slough has river side parking along Willow Grove Road; (2) that the intrusion into the set back area will be limited; and (3) that there will be no in water filling required to create the parking spaces allowed under the variance.

Pertaining to Parking Variance Issue and Agreed to by Members: Jensen, Kelley and Krebs-McMullen

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2 of the CCSMP, in 1978, is that Irby was required to comply with the prohibition of parking  
3 within 20 feet of the ordinary high water mark. We believe that this policy is consistent with  
4 the SMA and this Board's decisions. League of Women Voters v. County of King, SHB No.  
5 13 (1972) (holding that a proposed fill on an intertidal beach for the purpose of providing  
6 parking spaces for a boat launch is highly objectionable under any circumstance, and is not a  
7 use dependent on the shoreline).

8 **XXV**

9 Thus, we conclude that the design of the project is not compatible with the other  
10 permitted activities under the master program, in the area, and therefore violates WAC 173-  
11 14-150(2)(c).

12 **XXVI**

13 The proposal also is inconsistent with the criterion of the CCSMP, which requires that  
14 the variance "be in harmony with the general purpose and intent of the Master Program".  
15 CCSMP, VARIANCES, para. 3, at 29. Landfills, for example, are to be given priority for  
16 "water-dependent uses and for public uses," under the CCSMP. CCSMP, OTHER  
17 GENERAL SHORELINE USES, POLICIES, Landfill, para. 2(d), at 22. Parking for a  
18 private, residential use, is neither public, nor water-dependent.

19 **XXVII**

20 We conclude that the proposal is inconsistent, as well, with WAC 173-14-150(2)(d), in  
21 that its approval constitutes a special privilege, not enjoyed by other property owners in the  
22 area. This is based on the earlier reasoning, that the Waddles' variance would be the first for  
23 parking on Fisher's Slough.

1  
2 **XXII**

3 Any finding of fact deemed to be a conclusion of law is hereby adopted as such. From  
4 the foregoing, the Board issues this:

5  
6 **ORDER**

7 1. The County and Ecology's granting of the variance to the Waddles for the floating  
8 home is reversed.

9 2. The County and Ecology's granting of the variance to the Waddles for parking is  
10 affirmed.

1 DONE this 24<sup>th</sup> day of May, 1994.

2  
3 SHORELINES HEARINGS BOARD

4 Robert V. Jensen  
5 ROBERT V. JENSEN, Presiding Officer

6 Richard C. Kelley  
7 RICHARD C. KELLEY, Member

8 James A. Tupper  
9 JAMES A. TUPPER, Member

10 Bobbi Krebs-McMullen  
11 BOBBI KREBS-MCMULLEN, Member

12 Dave Wolfenbarger  
13 DAVE WOLFENBARGER, Member

14 Richard Gidley  
15 RICHARD GIDLEY, Member

16 S93-13F

### **INFORMATION ON EXHIBITS**

Please notify Ms. Robyn Bryant of this office 30 days after the date of this order if you will be arranging to have your oversized exhibits retrieved.

If you do not notify us, absent an appeal, the exhibits will be discarded. If the matter is appealed, the exhibits are sent to Superior Court.